Megan's Law: The New Jersey Supreme Court Navigates Uncharted Waters

The New Jersey Legislature responded with unprecedented speed to several high-profile violent sex crimes against children[1] by enacting the most comprehensive sex offender legislation in the nation.[2] The law is named after Megan Kanka, a seven-year-old girl who was sexually assaulted and murdered by a neighbor.[3] The alleged murderer, thirty-three-year-old Jesse Timmendequas, had a history of sexual offenses against children and lived with two other convicted sex offenders on the same street as the Kanka family.[4] Megan's murder occurred only a few months after another young girl, Amanda Wengert, was murdered[5] by a twenty-year-old neighbor who had a history of sexual offenses against children.[6]

The Legislature and the Governor responded to the public fervor that followed these crimes by swiftly enacting the nine bills known as Megan's Law.[7] The principal elements of Megan's Law provide for: (1) the registration of sex offenders and the creation of a central registry;[8] (2) community notification;[9] (3) notification procedures for the release of certain offenders;[10] (4) extended

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1 *See* Ivette Mendez, *Sex Offender Measures Go to Governor*, THE STAR-LEDGER (N.J.), October 21, 1994, at 1 [hereinafter Mendez, *Measures Go to Governor*] (noting that the enactment of Megan's law occurred within three months of the rape and murder of a seven-year-old girl); *see also*, Ivette Mendez, *Sex Offender Bills Enacted by Whitman*, THE STAR-LEDGER (N.J.), November 1, 1994, at 1 [hereinafter Mendez, *Bills Enacted*] (stating that Megan's Law had been "placed on the fast-track").

2 Kathy Barrett Carter, *Retroactive Sex Crime Law Raises Thorny Issue*, THE STAR-LEDGER (N.J.), January 15, 1995, at 1.

3 Michael Booth, *Constitutional Challenge Readied to "Megan's Law,"* 138 N.J.L.J. 1703, 1703 (1994); *see also* Ivette Mendez, *"Megan's Law": 10 Sex Offender Bills Clear Senate*, THE STAR-LEDGER (N.J.), October 4, 1994, at 1.

4 Guy Sterling, *Death Penalty Call in Megan Murder*, THE STAR-LEDGER (N.J.), Oct. 20, 1994, at 1, 12.

5 Mendez, *Measures Go to Governor*, *supra* note 1, at 1.

6 Mendez, *Bills Enacted*, *supra* note 1, at 10.

7 Mendez, *Bills Enacted*, *supra* note 1, at 1. Shortly after Megan's murder, the Legislature began the task of revising New Jersey's sex offender laws. *See* Mendez, *Measures Go to Governor*, *supra* note 1, at 1. The entire process took less than three months. *Id.* The first package of bills was introduced on August 10, 1994. *Id.* On October 3, 1994, the Senate unanimously passed 10 bills targeting sex offenders. Mendez, *supra* note 3, at 1. On October 20, 1994, the Assembly approved seven bills targeting sex offenders. Mendez, *Measures Go to Governor*, at 1, 18. On October 31, 1994 Governor Whitman signed into law nine bills comprising "Megan's Law." Mendez, *Bills Enacted*, *supra* note 1, at 1.

8 N.J. STAT. ANN. § 2C:7-1 to -5 (West 1995).

9 *Id.* §§ 2C:7-6 to -11.

10 N.J. STAT. ANN. § 30:4-123.53a (West Supp. 1995).

terms of incarceration for sexually-violent predators;[11] (5) the consideration of murder of a child under fourteen as an aggravating factor in death penalty proceedings;[12] (6) involuntary civil commitment of dangerous criminals;[13] (7) lifetime community supervision;[14] (8) the collection of a DNA sample from sex offenders for the creation of a DNA database and data bank;[15] and (9) no "good time" credits for sex offenders who refuse treatment.[16]

New Jersey's response to the danger posed by violent sexual offenders is not entirely novel.[17] At least forty states have adopted legislation targeting sex offenders.[18] Moreover, the federal govern-

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11 N.J. STAT. ANN. § 2C:43-7 (West 1995).

12 *Id.* § 2C:11-3c(4)(k).

13 N.J. STAT. ANN. § 30:4-82.4 (West 1995).

14 N.J. STAT. ANN. § 2C:43-6.4 (West 1995).

15 N.J. STAT. ANN. § 53:1-20.20 (West Supp. 1995).

16 N.J. STAT. ANN. § 2C:47-8 (West 1995).

17 *Cf.* WASH. REV. CODE ANN. §§ 9A.44.130, 4.24.550, 71.09.010-.230 (West Supp. 1996). Like Megan's Law, the Washington law requires sex offenders to register (§ 9A.44.130), permits law enforcement agencies to notify the public when necessary (§ 4.24.550), and provides for involuntary civil commitment of violent sexual predators (§ 71.09.010 to-.230). *Id.*

Other states have also enacted laws requiring registration and, in some cases, allowing for some type of notification. *See* Lynn Smith, *Dialing Up a Weapon Against Molestation*, L.A. TIMES, Oct. 5, 1994, at E1 (commenting that the California Legislature passed a law to create a 900 telephone number to provide private citizens access to a state registry of sex offenders); John Sanko, *Bill Aims to Unmask Sex Offenders*, ROCKY MTN. NEWS, March 15, 1995, at 4A (reporting that the Colorado Legislature is considering a bill that would allow residents to access sex offender registry); *Child Molester Registry Spurs Questions*, THE INDIANAPOLIS STAR, July 10, 1994, at B03 (describing Indiana statute known as "Zachary's Law," which created a sex offender registry, the information of which is available to schools and other organizations that work with children); *see also infra* note 18 (listing examples of similar statutes in various jurisdictions). *But see* Joe Hallinan, *Sex Abuser Registry Laws Rarely Used Nationally*, THE STAR-LEDGER (N.J.), Nov. 25, 1994, at 58 (reporting that although approximately 10 states have some notification provisions, few residents inquire about sex offenders; usually the interest is sparked after highly publicized crimes).

18 *See, e.g.*, ALA. CODE §§ 13A-11-200 to -203 (repl. 1994); ALASKA STAT. §§ 12.63.010, 18.65.087 (1995); ARIZ. REV. STAT. ANN. §§ 13-3821, 13-3825 (Supp. 1995); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie repl. 1995); CAL. PENAL CODE §§ 290-290.7 (West Supp. 1996); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1995); CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1995); DEL. CODE ANN. tit. 11 § 4120 (repl. 1995); FLA. STAT. ANN. §§ 775.21-.23 (West Supp. 1995); GA. CODE ANN. § 42-9-44.1 (Michie 1994); IDAHO CODE §§ 18-8301 to -8311 (Supp. 1995); ILL. ANN. STAT. ch. 730, para. 150/1-150/9 (Smith-Hurd Supp. 1995); IND. CODE ANN. §§ 5-2-12-1 to -13 (West Supp. 1995); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1993); KY. REV. STAT. ANN. §§ 17.510-.540 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. §§ 15:540-:549 (West Supp. 1995); ME. REV. STAT. ANN. tit. 34-A, §§ 11001-11004 (West Supp. 1995); MASS. GEN. LAWS ANN. ch. 22C, § 37 (West 1994); MICH. COMP. LAWS ANN. § 28.730 (West Supp. 1995); MINN. STAT. ANN. § 243.166 (West 1995); MISS. CODE ANN. §§ 45-33-1 to -19 (Supp. 1994); MO. ANN. STAT. § 566.600 (Vernon Supp. 1996); MONT. CODE ANN. §§ 46-23-501 to -508 (1995); NEV. REV. STAT. ANN.

ment has responded to the national concern over violent sex crimes against children by enacting the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.[19] The laws adopted by other states, however, are not as far-reaching or as prone to constitutional challenge as the New Jersey law.[20]

Since its enactment on October 31, 1994, several challenges to the law have been brought by sex offenders in both state and federal courts. The Supreme Court of New Jersey recently upheld Megan's Law in the controversial decision *Doe v. Poritz*.[21] Concurrently, the federal district court invalidated the notification provisions of Megan's Law as unconstitutional in *Artway v. Attorney General of New Jersey*.[22]

This Comment focuses on the registration and notification components of Megan's Law. Part I provides an overview of these two key components of the statute and explores the goals behind each provision. Part II profiles the sex offender and illustrates the problems encountered by the criminal justice system in dealing with violent sexual criminals. Part III examines the numerous constitutional issues raised by the challenges to Megan's Law and dis-

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§§ 207.151 to -.157 (Michie Supp. 1995); N.H. REV. STAT. ANN. § 632-A:12 (Supp. 1995); N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995); OHIO REV. CODE ANN. §§ 2950.01-.99 (Anderson repl. 1993); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West Supp. 1996); OR. REV. STAT. §§ 181.594-.602 (1995); R.I. GEN. LAWS § 11-37-16 (1994); S.D. CODIFIED LAWS ANN. §§ 22-22-31 to -41 (Supp. 1995); TENN. CODE ANN. §§ 40-39-101 to -108 (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1996); UTAH CODE ANN. § 77-27-21.5 (Supp. 1995); VA. CODE ANN. §§ 19.2-298.1 to -298.3, 19.2-390.1 (Michie repl. 1995); WASH. REV. CODE ANN. §§ 9A.44.130, 4.24.550, 71.09.010-.230 (West Supp. 1996); W. VA. CODE §§ 61-8F-1 to -8 (Supp. 1995); WIS. STAT. ANN. § 175.45 (West Supp. 1995); WYO. STAT. §§ 7-19-301 to -306 (1995).

On July 25, 1995, Governor George Pataki of New York signed a law modeled on New Jersey's Megan's Law. *N.Y. Adopts Statute Modeled on Jersey's*, THE STAR-LEDGER (N.J.), July 26, 1995, at 4.

19 *See* Jacob Wetterling Crimes Against Children and Sexual Violent Offender Registration Program, 42 U.S.C.A. § 14071 (1995). The Act encourages states to implement programs requiring registration of sex offenders. 42 U.S.C.A. § 14071(a)(1). The individual states must comply by September 13, 1997 to avoid ineligibility for federal funds. *Id.* § 14071(f). The Act also provides for public notification when it is necessary to protect the public. *Id.* § 14071(d).

20 *See* Carter, *supra* note 2, at 1, 14. New Jersey is the only state that provides for notification to law enforcement, schools, day care, youth organizations, and the general public. *Id.* at 14. New Jersey is only one of six states that require juveniles to register and one of seven states that requires the sex offender to register for life. *Id.* Additionally, the New Jersey law as adopted applies to sex offenders who committed their crimes prior to the adoption of Megan's Law, raising constitutional issues of *ex post facto* punishment. *Id.*

21 142 N.J. 1, 110-11, 662 A.2d 367, 422-23 (1995).

22 876 F. Supp. 666, 692 (D.N.J. 1995).

cusses the New Jersey Supreme Court's response to those issues. Part IV concludes that despite venturing into "uncharted waters,"[23] the New Jersey Supreme Court's pragmatic decision salvaged a well-intentioned but constitutionally infirm Megan's Law that is both timely and necessary.

I. THE PURPOSE OF MEGAN'S LAW

Historically, sex offender statutes such as Megan's Law have developed after highly-publicized violent sex crimes led to public demands for new laws to better protect society, and particularly children, from sex offenders.[24] The public outrage in New Jersey, as in other states, arose from a perception that existing laws did not adequately protect society from dangerous sex offenders.[25] The New Jersey Legislature enacted Megan's Law in order to protect

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[23] *Doe*, 142 N.J. at 109, 662 A.2d at 422. The New Jersey Supreme Court concluded its opinion by professing that:

> We sail on truly uncharted waters, for no other state has adopted such a far-reaching statute. All other notification statutes apparently make public notification discretionary on the part of officials; the statute before us, however, mandates it. Despite the unavoidable uncertainty of our conclusion, we remain convinced that the statute is constitutional. To rule otherwise is to find that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy.

Id.

[24] *See, e.g.*, Hal Quinn, *A Law to Curb Sex Offenders*, MACLEANS, March 1, 1993, at 21. Like New Jersey's law, Washington's "Sexually Violent Predator Laws" were enacted in 1990, after Earl Shriner sexually assaulted, mutilated, and attempted to murder a seven-year-old boy. *Id.* Shriner had a long history of violent sex crimes and had served a 10-year sentence for assaulting children. *Id.*

Californians sought to enact legislation targeting sex offenders after Polly Klass, age 12, was kidnapped, sexually assaulted, and murdered. Smith, *supra* note 17, at E1. Among the laws passed in response to Klass's murder was a statute establishing a 900 telephone number that will allow citizens to check names against a database of habitual sex offenders. *Id.*

Indiana enacted "Zachary's Law" after Christopher Stevens, a convicted child molester, molested and murdered 10-year-old Zachary Snider. *Child Molester Registry Spurs Questions*, INDIANAPOLIS STAR, July 10, 1994, at BO3.

[25] *See* Mendez, *Bills Enacted*, *supra* note 1, at 1, 10 (quoting New Jersey Governor Whitman that Megan's Law "breaks new ground in public protection"); *see also* David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 525-38 (1992) (describing public reaction to the inadequacies of sexual offender laws in the state of Washington after a highly-publicized crime). Broener, a participant of the Task Force created by the Governor of Washington to review the problems presented by sex offenders, describes the process undertaken by the state to change its sex offender laws. *Id.* at 538. The Task Force focused on creating a law that would close the "gap" in the then-existing laws that allowed a convicted sex offender to be

society by expanding law enforcement's arsenal for dealing with habitual sex offenders and by providing parents with the information necessary to protect their children.[26] At the heart of Megan's Law lie provisions requiring registration[27] and notification.[28]

A. *Registration*

The purpose of registration is to assist law enforcement in preventing and solving sexual abuse and missing persons cases by providing law enforcement agencies with immediate access to information about sex offenders and other dangerous persons.[29] The Legislature enacted the system of registration in response to public safety concerns raised by the high risk of recidivism among sex offenders.[30] The statute provides for the creation of a central registry[31] and for the sharing of information between the law enforcement agencies of New Jersey, other states, and the federal government.[32] When necessary for the protection of the public, the statute permits law enforcement agencies to disseminate information regarding a registered sex offender to the public.[33]

Any person convicted, acquitted due to insanity, or adjudi-

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released into the community after he had repeatedly shown that he was dangerous. *Id.* at 546-47.

26 *See* N.J. STAT. ANN. § 2C:7-1 (stating legislative declaration of purpose for Megan's Law).

27 *Id.* §§ 2C:7-1 to -5.

28 *Id.* §§ 2C:7-6 to -11; N.J. STAT. ANN. § 30:4-123.53a.

29 N.J. STAT. ANN. § 2C:7-1. Specifically, the legislative findings state that:

> The Legislature finds and declares:
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> a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.
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> b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

Id.

30 *Id.* "Recidivism" is defined as "a tendency to relapse into a previous condition or mode of behavior; *esp.*: relapse into criminal behavior." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 983 (9th ed. 1991).

31 N.J. STAT. ANN. § 2C:7-4(d).

32 *Id.* § 2C:7-5(a).

33 *Id.* § 2C:7-5(a). Release of information is to be carried out in accordance with N.J. Stat. Ann. § 2C:7-6 to -11 and the guidelines promulgated by the Attorney General. *Id.*; *id.* § 2C:7-8(a). For a discussion of the New Jersey Supreme Court's interpretation of the notification provision, see *infra* notes 51-52, 54-56, 58.

cated delinquent in connection with a sex offense[34] must register.[35] If a court determines that the offender's conduct may be characterized as repetitive, compulsive behavior, then the registration requirement is imposed even if the offense or conviction occurred prior to the enactment of Megan's Law.[36] An offender's failure to register is classified as a fourth-degree offense.[37]

Persons required to register are notified[38] and must complete the registration forms with the designated registering agent.[39] Sex

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[34] N.J. STAT. ANN. §§ 2C:7-2(b)(1)-(3). The statute defines the following as sex offenses:

> (1) Aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1 or an attempt to commit any of these crimes if the court found that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, regardless of the date of the commission of the offense or the date of conviction;
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> (2) A conviction, adjudication of delinquency, or acquittal by reason of insanity for aggravated sexual assault; sexual assault; aggravated criminal sexual contract [*sic*]; kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S. 2C:24-4; endangering the welfare of a child pursuant to paragraph (4) of subsection b. of N.J.S. 2C:24-4; luring or enticing pursuant to section 1 of P.L.1993, c.291 (C. 2C:13-6); criminal sexual contact pursuant to N.J.S. 2C:14-3b. if the victim is a minor; kidnapping pursuant to N.J.S. 2C:13-1, criminal restraint pursuant to N.J.S. 2C:13-2, or false imprisonment pursuant to N.J.S. 2C:13-3 if the victim is a minor and the offender is not the parent of the victim; or an attempt to commit any these enumerated offenses if the conviction, adjudication of delinquency or acquittal by reason of insanity is entered on or after the effective date of this act or the offender is serving a sentence of incarceration, probation, parole or other form of community supervision as a result of the offense or is confined following acquittal by reason of insanity or as a result of civil commitment on the effective date if this act;
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> (3) A conviction, adjudication of delinquency or acquittal by reason of insanity for an offense similar to any offense enumerated in paragraph (2) or a sentence on the basis of criteria similar to the criteria set forth in paragraph (1) of this subsection entered or imposed under the laws of the United States, this state or another state.

Id.

[35] *Id.* § 2C:7-2(a).

[36] *Id.* § 2C:7-2(b)(1).

[37] *Id.* § 2C:7-2(a).

[38] N.J. STAT. ANN. § 2C:7-3 (West 1995). Notice of the obligation to register will be provided by the sentencing court; by the Department of Corrections, the Administrative Office of the Courts, and the Department of Human Services; by the Division of Motor Vehicles; and by the Attorney General. *Id.*

[39] *Id.* § 2C:7-2(c). The registration procedures for sexual offenders require that persons under supervision such as work release, parole, probation, furlough, or a similar program "shall register at the time the person is placed under supervision or no

offenders who are required to register can file a petition in superior court to terminate their registration obligation if in the fifteen years following a conviction or release from prison they have not committed any offenses or the person does not pose a threat to public safety.[40]

Each registrant must provide detailed physical descriptions and vital statistics, including permanent and temporary addresses and place of employment.[41] Additionally, a complete criminal history must be provided for registration.[42] The statute allows the Attorney General to specify any other pertinent information required to assess the risk of reoffense, including nonprivileged records and genetic markers.[43]

The registering agent must send the information to both the state central registry and to the prosecutor of the county in which the offender intends to reside.[44] The county prosecutor must in turn transmit the information to local law enforcement agencies.[45] The fingerprints and conviction data are also sent to the Federal

later than 120 days after the effective date of this act, whichever is later" with the agency responsible for supervision. *Id.* § 2C:7-2(c)(1).

Persons confined in correctional institutions or those involuntarily committed "shall register prior to release in accordance with procedures established by the Department of Corrections or the Department of Human Services." *Id.* § 2C:7-2(c)(2).

A person moving into New Jersey from another state "shall register with the chief law enforcement officer of the municipality in which the person will reside . . . within 120 days of the effective date of this act or 70 days of first residing in or returning to a municipality in this State, whichever is later." *Id.* § 2C:7-2(c)(3).

Offenders convicted before the law went into effect who are not in custody or supervision "shall register within 120 days of the effective date of this act with the chief law enforcement officer of the municipality in which the person will reside." *Id.* § 2C:7-2(c)(4).

If registered persons move, they must notify the law enforcement agency they are registered with and must reregister 10 days before they intend to reside at the new address. *Id.* § 2C:7-2(d). A person who is required to register under this Act for a conviction or an offense similar to the ones enumerated in the law must verify his address annually with the proper law enforcement agent. *Id.* § 2C:7-2(e). For an example of the sex offender registration form, see *infra* Appendix A.

40 N.J. STAT. ANN. § 2C:7-2(f).

41 *Id.* § 2C:7-4(b)(1). The information that must be gathered for registration includes the offender's "name, ocial security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary address, date and place of employment." *Id.*

42 *Id.* § 2C:7-4(b)(2). A registrant must provide the "[d]ate and place of each conviction, adjudication or acquittal by reason of insanity, indictment number, fingerprints, and a brief description of the crime or crimes for which registration is required." *Id.*

43 N.J. STAT. ANN. § 2C:7-4(b)(3).

44 *Id.* § 2C:7-4(c).

45 *Id.*

Bureau of Investigation.[46] The law provides immunity from civil liability to public officials or employees for their discretionary decisions to release necessary and relevant information to other employees, agencies, or the general public.[47] A recent amendment to the current law provides that certain sex offenses cannot be expunged from an offender's records.[48]

B. Notification

The goal of notification is to increase public safety through awareness.[49] The law establishes three levels, or tiers, of classification and notification—low (Tier One), moderate (Tier Two), and high (Tier Three)—based on the risk of reoffense.[50] The classification of the sex offender and the method of notification will be determined by the county prosecutor.[51] In determining the risk of

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46 *Id.*

47 N.J. STAT. ANN. § 2C:7-5(b). The civil immunity provision includes exceptions for gross negligence and bad faith. *Id.*

48 N.J. STAT. ANN. §2C:52-2(b), *amended by* 1994 N.J. LAWS c.133 § 6. The amendment provides, in part, that:

> Records of conviction for the following crimes specified in the New Jersey Code of Criminal Justice shall not be subject to expungement: Section 2C:11-1 et seq. (Criminal Homicide), except death by auto as specified in section 2C:11-5; section 2C:13-1 (Kidnapping); section 2C:13-6 (Luring or Enticing); section 2C:14-2 (Aggravated Sexual Assault); section 2C:14-3a (Aggravated Criminal Sexual Contact); if the victim is a minor, section 2C:14-3b (Criminal Sexual Contact); if the victim is a minor and the offender is not the parent of the victim, section 2C:13-2 (Criminal Restraint) or section 2C:13-3 (False Imprisonment); section 2C:15-1 (Robbery); section 2C:17-1 (Arson and Related Offenses); section 2C:24-4a. (Endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a child); section 2C:24-4b(4) (Endangering the welfare of a child); section 2C:28-1 (Perjury); section 2C:28-2 (False Swearing) and conspiracies or attempts to commit such crimes.

Id.

49 Brief for *amici curiae* Maureen & Richard Kanka *et al.* at 11, Artway v. Attorney General of New Jersey, 876 F. Supp. 666 (D.N.J. 1995) (No. 94-6287(NHP)).

50 N.J. STAT. ANN. § 2C:7-8(c).

51 *Id.* § 2C:7-8(d). The tier classification is determined by both the prosecutor of the county where the offender was convicted and the prosecutor of the county where the offender intends to live. *Id.* § 2C:7-8(d)(1). The method of notification is determined by the county prosecutor where the registrant lives. *Id.* § 2C:7-8(d)(2). If a registrant relocates, the chief law enforcement officer for the community to which the offender relocates shall notify the community. *Id.* § 2C:7-7. All records pertaining to notification and disclosure shall be kept in accordance with the Attorney General Guidelines. *Id.* § 2C:7-8(e).

But see Doe v. Poritz, 142 N.J. 1, 30, 662 A.2d 367, 382 (1995). Although leaving the initial determination as to tier classification and manner of notification in the hands of the prosecutor, the *Doe* decision modifies the procedures by requiring that sex offenders be given an opportunity for judicial review of the tier classification and

reoffense and level of classification, the prosecutor must consider the criteria set out in the statute.[52]

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manner of notification if they so request. *Id.* The New Jersey Supreme Court established an elaborate framework to accommodate any such requests. *Id.* at 30-35, 662 A.2d at 382-85.

[52] *See* N.J. STAT. ANN. § 2C:7-8(b). The relevant factors that a prosecutor must consider include:

> (1) Conditions of release that minimize risk of re-offense, including but not limited to whether the offender is under supervision of probation or parole; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;
> (2) Physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;
> (3) Criminal history factors indicative of high risk of re-offense, including:
> (a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior;
> (b) Whether the offender served the maximum term;
> (c) Whether the offender committed the sex offense against a child;
> (4) Other criminal history factors to be considered in determining risk, including:
> (a) The relationship between the offender and the victim;
> (b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury;
> (c) The number, date and nature of prior offenses;
> (5) Whether psychological or psychiatric profiles indicate a risk of recidivism;
> (6) The offender's response to treatment;
> (7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and
> (8) Recent threats against persons or expressions of intent to commit additional crimes.

Id.; *see also* Memorandum from Deputy Attorney General Jessica S. Oppenheim, Prosecutors Bureau, State of New Jersey Department of Law and Public Safety, Division of Criminal Justice to all [N.J.] County Prosecutors, *Guidelines for Law Enforcement for Notification to Local Officials and/or the Community of the Entry of Sex Offender Into the Community* 7, 8 (Sept. 14, 1995) [hereinafter *Attorney General Guidelines*] (referring to addendum, entitled *Sex Offender Risk Assessment Scale Manual* (Sept. 14, 1995), which further defines the factors to be considered for tier classification) (both on file with the *Seton Hall Law Review*). For an example of the Sex Offender Risk Assessment Scale Manual utilized by county prosecutors, see *infra* Appendix B.

Pursuant to its mandate that offenders be given an opportunity for a judicial hearing prior to classification, the New Jersey Supreme Court, in *Doe v. Poritz*, offered even more specific guidance to courts reviewing a prosecutor's determination as to tier classification and manner of notification. *Doe*, 142 N.J. at 32, 662 A.2d at 383. The court mandated that the reviewing court must affirm the prosecutor's classification determination unless "persuaded by a preponderance of the evidence that [the determination] does not conform to the law and guidelines." *Id.* The majority pronounced that the only issue before a reviewing court is risk of reoffense. *Id.* The court then addressed the standard for distinguishing between Tier Two (moderate risk) and Tier Three (high risk) based on the factors in the law and the *Attorney General Guidelines*. *Id.* at 32-33, 662 A.2d at 383. The majority noted that all offenders

The extent of notification varies by tier classification.[53] A Tier One low-risk classification only requires that community law enforcement personnel be notified.[54] Tier Two moderate-risk classifications, in addition to requiring notification to local law enforcement, require notification to religious, youth, and other community organizations, and to schools.[55] Tier Three high-risk classifications require public notification as well as the requirements of Tiers One and Two.[56] Additionally, the law permits pub-

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required to register fit into Tier One notification, regardless of risk of reoffense. *Id.* at 33, 662 A.2d at 383. The court provided the following detailed criteria for differentiating between the tier classifications:

> We conclude that the legislative intent was to use the word "moderate" in comparison to the "low" risk that the Legislature found was minimally characteristic of all those sex offenders required to register. Where Tier Two notification is sought, the State's *prima facie* case shall include a description of the class of sex offenders required to register who constitute low-risk offenders, including a description of that risk, which need not necessarily be statistical; a further description of that class of sex offenders required to register who constitute moderate-risk offenders, including a description of that risk, not necessarily statistical; some proof, in the form of expert opinion or otherwise, that the moderate-risk offender class poses a risk of reoffense substantially higher than the low-risk class, and that the offender before the court is a moderate risk-offender who poses such a substantially higher risk.
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> Where Tier Three notification is sought, the State's *prima facie* case shall include, in addition to the description of low-risk and moderate-risk offenders and the risk associated with each class, a description of the class of sex offenders required to register who constitute high-risk offenders, including a description of that risk, not necessarily statistical; some proof, in the form of expert opinion or otherwise, that the high-risk offender class poses a risk of reoffense substantially higher than the moderate-risk offender class, and that the offender before the court is a high-risk offender who poses that substantially higher risk.

Id.

53 N.J. STAT. ANN. § 2C:7-8(c).

54 *Id.* § 2C:7-8(c)(1). At a minimum, all sex offenders who are required to register will be considered Tier One. *Doe*, 142 N.J. at 33, 662 A.2d at 383.

55 N.J. STAT. ANN. § 2C:7-8(c)(2). In *Doe v. Poritz*, the Supreme Court established mandatory procedures for the manner of Tier Two notification. *Doe*, 142 N.J. at 35, 662 A.2d at 384-85. The court interpreted the statute to state that only organizations that have custody or care of children or women and are "likely to encounter" the offender may receive Tier Two notification. *Id.*, 662 A.2d at 384. The court stated that the critical factor in determining "likely to encounter" is geographic proximity to the offender's place of work, residence, or school. *Id.* at 37, 662 A.2d at 385. The court, however, acknowledged that the determination must be made on a case-by-case basis and allowed for consideration of factors other than geography. *Id.* Additionally, the court instructed any organization receiving Tier Two notice "*not* to notify anyone else." *Id.* at 35, 662 A.2d at 384. The court asserted that an interpretation excluding organizations that concern the welfare of women and/or children, but do not actually have them under custody or care, accords with the *Attorney General Guidelines*. *Id.*, 662 A.2d at 384-85.

56 N.J. STAT. ANN. § 2C:7-8(c)(3). As with Tier Two notification, the New Jersey

lic notification for situations not specifically enumerated in the statute when a danger to the community exists.[57] All notification must be conducted pursuant to the *Attorney General Guidelines*.[58] A person will not be held liable for his or her decision to provide or not to provide information under this Act.[59]

II. SEX OFFENDERS

A. *A Profile of the Sex Offender*

Megan's Law purports to protect society from the habitual sex offender.[60] Although the law covers a wide range of sex offenses,[61] the notification provisions only target a small group of dangerous offenders whose behavior is characterized by repetitive and compulsive conduct.[62] Laws specifically targeting sex offenders, as distinct from other criminals, have generally existed since World War II.[63] Historically, sex offenders have been singled out due to a per-

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Supreme Court set forth mandatory procedures to be followed for Tier Three notification. *Doe*, 142 N.J. at 36, 662 A.2d at 385. For Tier Three notification, the court stated that " 'likely to encounter' clearly includes the immediate neighborhood of the offender's residence and not just the people next door." *Id.* The court elaborated that Tier Three notification could include all schools within a municipality, contingent upon its size, as well as schools or institutions in neighboring municipalities if within close proximity to the offender. *Id.*

57 N.J. STAT. ANN. § 2C:7-10.

58 *Id.* § 2C:7-8(d) (requiring the Attorney General to promulgate guidelines for the evaluation of risk of reoffense and implementation of community notification).

Pursuant to the New Jersey Supreme Court's opinion in *Doe v. Poritz*, the Attorney General has issued revised guidelines. *See Attorney General Guidelines*, *supra* note 52. In *Doe*, the court established that the *Attorney General Guidelines* were adequate as enacted as to Tiers One and Two, but needed revisions as to Tier Three. *Doe*, 142 N.J. at 35, 36, 662 A.2d at 384, 385. In order to comply with the court's mandate, the revised *Attorney General Guidelines* prohibit public notification through a press release or radio announcement. *Attorney General Guidelines*, *supra* note 52, at 12. The *Attorney General Guidelines* now require a more particularized method of notification—such as door-to-door announcements or by mail—that will only appraise those members of the public who are "likely to encounter the offender." *Id.* at 12-13. The prosecutor's office is also prohibited from answering any questions from the press relating to a particular offender. *Id.* at 12.

59 N.J. STAT. ANN. § 2C:7-9. Immunity, however, does not apply to "willful or wanton acts of commission or omission." *Id.*

60 *Id.* § 2C:7-1.

61 *Id.* § 2C:7-2(b); *see also supra* note 34 (providing statutory text defining sexual offenses relevant to Megan's Law).

62 *Id.* § 2C:7-8(c). The notification provision provides for a determination of the risk of reoffense classifying the offender into one of three notification tiers. *Id.* Public notification is only allowed when the risk of reoffense is high. *Id.* § 2C:7-8(c)(3).

63 ALFRED B. VUOCOLO, THE REPETITIVE SEX OFFENDER xi (1969). Michigan was the first state to target the habitual sex offender with the adoption of its sexual psychopathic law in 1937. *Id.* at 25. By 1966, 31 states had developed laws directed specifically toward the habitual sex offender. *Id.* at xi.

ception that they pose a special danger to the community.[64] One reason for this perception is that sex crimes draw considerable attention, especially when committed against children.[65] The perception that sex offenders pose a special danger to the community has gained substance from studies showing that sex offenders exhibit a higher rate of recidivism than previously thought.[66]

Although sex offenders have historically been targeted by legislation that has subjected them to disparate treatment than the general criminal population, the criminal justice system has been inconsistent in its categorization and treatment of sex offenders.[67]

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64 *Id.* at 7. This perception arises from two seemingly disparate sources: the concept that sex offenders are both mentally ill and criminally accountable. *Id.* Specifically,

> [t]he public has been ready to accept the concept that something must be mentally and/or physically wrong with certain types of offenders. This applies primarily to the narcotic user, the mother who kills her child and the sexual offender. . . . [W]ith the sex offender, perhaps because of the great amount of resentment generated toward the child-molester, or the homosexual who flaunts a disdainful attitude toward moral values, or the exhibitionist or rapist who inflicts himself upon others in an offensive manner, the attitude is somewhat different. Here society, while recognizing the need for treatment and the presence of powerful internal drives, remains reluctant to remove accountability . . . . It continues to demand chastisement or at least restraint.

Id.

65 *See* Mendez, *Measures Go to Governor*, *supra* note 1, at 1 (reporting that Megan's Law resulted in part from the high visibility of the underlying crime); *see also*, Mendez, *supra* note 3, at 3 (noting same).

66 *See* A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME AND DELINQ., 450, 456 (July 1982) (concluding that contrary to popular belief, sex offenders "are serious recidivists," exhibiting recidivism rates comparable to nonsexual offenders); Joseph J. Romero & Linda Meyer Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study*, FED. PROBATION, Mar. 1985, at 63 (noting that individuals with a history of sex offenses tend to demonstrate higher recidivism rates than one-time offenders).

67 *See* VUOCOLO, *supra* note 63, at 8 (asserting that although sex offender laws vary greatly, each jurisdiction finds the statutory framework unsatisfactory). These unsatisfactory laws arise from a conflicting societal perception of sexual offenses:

> At one end of the scale is found the philosophy that these acts represent mere moral weakness; opposed to this is the notion that they are a result of a psychologically-determined organism and probably not within the offender's competence to control. The scientists who plump for psychiatric treatment and relief from legal procedures clash directly here with those who desire to protect society's values.
>
> What has emerged is legislation in over half of our states that is a compromise between these moral and scientific considerations. The laws have not evolved in the natural course of legal progression nor were they based on research in the area of criminal statistics or treatment of sex offenders. Rather, they were usually hastily prepared in response to public insistence after a series of local sex crimes.

Id. at 8 (footnote omitted)

Psychiatrists and corrections professionals have not reached a consensus as to whether sex offenders suffer from mental illnesses requiring treatment, or whether they are criminals who should be incarcerated and punished.[68] The result is that sex offenders occupy a grey area as both criminals and mentally ill persons.[69]

The confusion regarding the classification and treatment of sex offenders results from the difficult, if not impossible, task of attempting to develop an accurate sex offender composite.[70] Studies have attempted to create a profile of the sex offender by analyzing personality traits; these studies, however, have been inconclusive.[71] For example, a recent study categorized sex offenders by the nature of the crime and by the age of the victim.[72] This study found that pedophiles are predominately white males,[73] of all age categories,[74] with prior histories tending to show few crimes against property,[75] and exhibiting a lifestyle centered around deviant sexual behavior.[76] The rapists, the study concluded, tended to be younger than both pedophiles and hebephiles.[77]

The racial characteristics of rapists were inversely related to the age of the victim; as the age of the victim increased beyond sixteen years of age, the offender was more likely to be non-Cauca-

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68 *Id.* at 16-18. For an overview of the perspective that sex offenders suffer from a mental disorder, see Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 233, 233-34 (1989) (averring that pedophilia is a mental disorder that can be treated and that making a moral statement about pedophiliacs by placing them in prison does not help because prison alone will not increase the pedophile's ability to deal with the problem).

69 *See* VUOCOLO, *supra* note 63, at 17-18.

70 *Id.* at 57. Dr. Vuocolo states that "[i]n addition to the many problems of definition, there exists the major consideration of extent and method of sampling." *Id.*

71 *See, e.g.*, Bruce Duthie & Daniel L. McIvor, *A New System for Cluster-Coding Child Molester MMPI Profile Types*, 17 CRIM. JUST. & BEHAV. 199, 199-200 (1990) (noting that grouping child molesters with other sexual offenders has made it more difficult to identify the differences between classes of child molesters and other offenders); James M. Peters & William D. Murphy, *Profiling Child Sexual Abusers: Legal Considerations*, 19 CRIM. JUST. & BEHAV. 38, 39 (1992) (reporting that psychological profiles are rarely used as evidence in court because they are considered unreliable); Andrei Kuznestov et al., *Victim Age as a Basis for Profiling Sex Offenders*, FED. PROBATION, June 1992, at 34 (finding that empirical evidence shows that reliance on personality traits in clinical studies is ambiguous).

72 *See* Kuzenstov, *supra* note 71, at 35.

73 *Id.* at 36. The study found that 83% of offenders who victimize children under age 10 are white males. *Id.*

74 *Id.* at 35.

75 *Id.* at 36.

76 *Id.* at 37.

77 *Id.* at 35, 36. The study found that the majority of rapists were under 30. *Id.* at 35.

sian.[78] Unlike pedophiles, rapists tended to have more prior convictions for crimes against property as well as other nonsexual violent crimes, and their victims were most likely to be strangers or merely casual acquaintances.[79] According to the study, rapists are best categorized as "criminal" and "violent."[80] Marital status was inconclusive as to either rapists or pedophiles.[81] The third group, hebephiles,[82] could be described as "family men"; they are more likely than either rapists or pedophiles to be married, to have children of their own, and to be over age thirty.[83]

Although it appears that most sexual offenders exhibit some form of paraphilia,[84] dissent reigns within the mental health profession as to whether sexual offenders are mentally ill.[85] Paraphiliacs do not consider themselves mentally ill and usually require the aid of mental health professionals after acting out their urges with nonconsenting partners (thus committing crimes) or

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78 *Id.* at 36.

79 *Id.*

80 *Id.*

81 *Id.* at 35.

82 *See* D.J. Baxter et al., *Deviant Sexual Behavior: Differentiating Sex Offenders by Criminal and Personal History, Psychometric Measures, and Sexual Response*, 11 CRIM. JUST. & BEHAV., 477, 478 (1984) (defining hebephiles as "men who have sexually molested pubescent or young postpubescent adolescents").

83 *Id.* at 486, 488. *But see* Kuznestov, *supra* note 71, at 35 (stating that "the heterosexual hebephilic aggressor may be even more psychopathic than aggressors against adult women or female children").

84 *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 279 (3d ed. rev. 1987) [hereinafter DSM III] (noting that "[p]araphiliacs are characterized by arousal in response to sexual objects or situations that are not part of normative arousal-activity patterns"). Paraphilia is a clinically-defined sexual disorder,

> [t]he essential feature of [which] is recurrent intense sexual urges and sexually arousing fantasies generally involving either (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner (not merely simulated), or (3) children or other nonconsenting persons. The diagnosis is made only if the person has acted on these urges, or is markedly distressed by them.

Id. There are approximately eight recognized paraphilias: (1) exhibitionism; (2) frotteurism; (3) fetishism; (4) pedophilia; (5) transvestic fetishism; (6) sexual sadism; (7) sexual masochism; and (8) voyeurism. *Id.* at 280.

85 *See, e.g.*, James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 849 (1992) (attacking the soundness of the Washington State Legislature's adoption of "sexually violent predator" as a form of mental illness). Dr. Reardon argues that there is no such classification in the scientific literature; he asserts that the legislature is confusing "mental disorder" (characterized by "the loss of contact with reality, confusion, loss of reason, or hallucinations") with "abnormal behavior." *Id.* at 852. *But see* Berlin, *supra* note 68, at 234-35 (proposing that paraphilia is a mental disorder, comparable to drug addiction or alcoholism, that may be treatable with Depo-Provera). *Id.*

when their behavior leads to conflict with their sexual partners.[86] Many paraphiliacs suffer from more than one paraphilia and may also have other mental disorders.[87]

B. *Treatment and Recidivism*

Mental health officials disagree about the effectiveness of treatment for sex offenders.[88] Studies conclude that recidivism among sex offenders is very high, regardless of whether they have attended treatment.[89] Other studies, however, conclude that sex offenders can be rehabilitated and that their recidivism rate is no higher than that of other criminals.[90]

The Legislature based the notification provisions of Megan's Law on the premise that habitual or compulsive sex offenders have a higher rate of recidivism and that some suffer from a mental illness,[91] consequently rendering them dangerous.[92] Although the

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86 DSM III, *supra* note 84, at 280.

87 *Id.* The DSM III states that "[p]ersonality disturbances, particularly emotional immaturity, are also frequent, and may be severe enough to warrant an Axis II diagnosis of a Personality Disorder." *Id.* at 281.

88 *See* Seth C. Kalichman, *Commentary on Alexander (1993)*, 20 CRIM. JUST. & BEHAV. 388, 389 (1993) (noting that arguments between hospitalization and incarceration of sex offenders suffer from a lack of proven effective treatment techniques). *But see* Robert J. McGrath, *Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 328, 329 (1991) (concluding that advances in treatment and assessment of sex offenders have made treatment a useful mechanism in reducing recidivism).

89 *See* Vernon L. Quinsey et al., *Assessing Treatment Efficacy In Outcome Studies of Sex Offenders*, 8 J. INTERPERSONAL VIOLENCE 512, 521 (1993) (concluding that effectiveness of treatment in reducing sex offender recidivism has not yet been demonstrated); *see also*, Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 25 & n.9 (1989) (noting that the recidivism rate of treated offenders tends to be higher than the rate of untreated offenders); Margit C. Henderson & Seth C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990) (recognizing that most treatment approaches result in high recidivism rates).

90 Robert J. McGrath, *Sex Offender Treatment: Does It Work?*, PERSPECTIVES, Winter 1995, at 24; *see also*, McGrath, *supra* note 88, at 328 (noting that recent studies have yielded encouraging results in the efficacy of sex offender treatment).

91 N.J. STAT. ANN. § 30:4-27.2(r) (West Supp. 1995). The law defining mental illness states:

> "Mental illness" means a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality, but does not include simple alcohol intoxication, transitory reaction to drug ingestion, organic brain syndrome or developmental disability unless it results in the severity of impairment described herein. The term mental illness is not limited to "psychosis" or "active psychosis," but shall include all conditions that result in severity of impairment described herein.

Legislature may reasonably accept this view, the question remains whether the state will be able, based on the current perspective of psychiatric knowledge, to accurately identify those offenders who pose the highest risk of recidivism for Tier Three notification.[93]

III. CONSTITUTIONAL ISSUES RAISED AGAINST THE REGISTRATION AND NOTIFICATION PROVISIONS

Megan's Law applies to all sex offenders who have been found to be habitual and compulsive, regardless of the time of the conviction or adjudication.[94] Sex offenders who have served their time and have returned to the community are required to register[95] and, in some cases, will be subject to community notification, regardless of when the offense was committed.[96] Offenders who were convicted or adjudicated for a sex offense prior to the enactment of Megan's Law claim that the law as applied to them violates the constitutional prohibition[97] against *ex post facto* laws,[98] bills of at-

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Id.

92 *See* N.J. STAT. ANN. § 2C:7-1(a) (West 1995) (providing legislative purpose for Megan's Law, specifying sex offenders as "persons who prey on others as a result of mental illness").

93 *Cf.* Doe v. Poritz, 142 N.J. 1, 15, 662 A.2d 367, 374 (1995) (noting that the legislative determination that recidivism of sex offenders poses a serious public threat is beyond judicial review and accepting legislative reliance on supporting scientific data).

94 N.J. STAT. ANN. § 2C:7-2(b)(1). If a sex offender is characterized as repetitive and compulsive, Megan's Law applies even if that person was convicted or adjudicated prior to its enactment. *Id.*

95 *Id.* § 2C:7-2(c)(4).

96 *Id.* § 2C:7-5(a) (stating that "[l]aw enforcement agencies in this State shall be authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection"); *see also supra* notes 51-52, 54-56, 58 (discussing the notification procedure as modified by the New Jersey Supreme Court).

97 *See* Carter, *supra* note 2, at 1, 10.

98 U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from passing *ex post facto* laws); U.S. CONST. art. I, § 10, cl. 1 (prohibiting individual state governments from passing *ex post facto* laws). The New Jersey Constitution of 1947 contains a similar prohibition. N.J. CONST. art. IV, § 7, ¶ 3. The New Jersey Constitution's prohibition against *ex post facto* laws has been found to be coextensive with the United States Constitution's prohibition. *See, e.g., In re* Recycling & Salvage Corp., 246 N.J. Super. 79, 106, 586 A.2d 1300, 1315 (App. Div. 1991).

In defining the boundaries of the *ex post facto* clause, the United States Supreme Court has stated that "[a]lthough the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990) (citations omitted). For further discussion of what constitutes an *ex post facto* law, see *infra* notes 116-17 and accompanying text.

tainder,[99] double jeopardy,[100] and cruel and unusual punishment.[101] Additional challenges are based on claims that the law violates the sex offender's right to privacy, procedural due process, and the Equal Protection Clause of the United States Constitution.[102]

In its recent opinion, *Doe v. Poritz*, the New Jersey Supreme Court addressed all of these constitutional issues, resolving each primarily on the basis of federal law.[103] In *Doe*, the court rebuffed the constitutional attacks to the registration and notification provisions of the statute.[104] In upholding Megan's Law, the court deferred to the Legislature, acknowledging the difficult choice between potential unfairness to previously convicted sex offenders who may have reintegrated into the community and to innocent women and children who, without the information that notification provides, might not be able to adequately protect themselves.[105]

The court found that, having chosen to balance the risk of unfairness in favor of protecting potential victims, the Legislature attempted to narrowly tailor the reach of notification to limit its impact on sex offenders.[106] Furthermore, the court determined that the Legislature could reasonably adopt the view that sex offenders have a higher rate of recidivism than other criminal of-

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99 U.S. CONST. art. I, § 9, cl. 3. A bill of attainder is defined as "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." BLACK'S LAW DICTIONARY 165 (6th ed. 1990).

100 U.S. CONST. amend. V. Double jeopardy is generally defined as a "Fifth Amendment guarantee, enforceable against [the] states through [the] Fourteenth Amendment, [which] protects against second prosecution for [the] same offense after acquittal or conviction, and against multiple punishment for [the] same offense." BLACK'S LAW DICTIONARY 491 (6th ed. 1990).

101 U.S. CONST. amend. VIII. The prohibition against cruel and unusual punishment has been characterized by the United States Supreme Court as proscribing torture and other barbaric forms of punishment. Estelle v. Gambel, 429 U.S. 97, 102 (1976). The Court has also established that what is considered cruel and unusual punishment depends on "the evolving standards of decency that mark the progress of a maturing society." *Id.*

102 *See* Doe v. Poritz, 142 N.J. 1, 26, 662 A.2d 367, 380 (1995); *see also* Artway v. Attorney General of New Jersey, 876 F. Supp. 666, 668 (D.N.J. 1995).

103 *Doe*, 142 N.J. at 42, 662 A.2d at 388. The majority stated that its holding relied almost completely on federal cases, despite the plaintiff's challenge basis on both the New Jersey and Federal Constitutions. *Id.* The court explained that "[w]e know of no relevant New Jersey cases on any of these issues." *Id.*

104 *Id.* at 110, 662 A.2d at 423. The court modified and affirmed the trial court's judgment and rejected the constitutional attack on the law. *Id.*

105 *Id.* at 13, 15, 662 A.2d at 373, 374.

106 *Id.* at 13, 662 A.2d at 373.

fenders.[107] The court also acknowledged that unless the law were made to apply retroactively, it would not protect anyone until some time in the distant future.[108] Notwithstanding the foregoing, the court upheld Megan's Law based on an interpretation of the statute that "strictly confine[s] . . . notification in accordance with legislative intent"[109] and requires judicial review of both tier classification and the specific manner of notification before actual notification when requested by the offender.[110]

In a lengthy dissent, Justice Stein disputed the majority's resolution of the constitutional issues.[111] The justice found that the retroactive application of Megan's Law renders it unconstitutional despite the legislative intent.[112] Additionally, the dissent disagreed with the majority's standard for determining whether the notification provision constitutes punishment, stating that the court placed a mistaken emphasis on legislative intent.[113]

A. *Is the Law Punitive? The Ex Post Facto Punishment, Bill of Attainder, Double Jeopardy, and Cruel and Unusual Punishment Challenges*

Central to the challenges to Megan's Law lies the claim that registration and notification constitute punishment,[114] making those who were convicted or adjudicated prior to the enactment of the law subject to punishment greater than that stipulated by law at the time of the crime.[115] Historically, the prohibition against *ex post facto* laws arose from the colonists' experience with the abuse of such devices by the British.[116] In *Calder v. Bull*, the United States

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107 *Id.* at 15, 662 A.2d at 374. The court stated that although there are different views on the subject of sex offender recidivism, it is within the Legislature's power to determine which view it will accept and "[s]uch a legislative determination is beyond judicial review." *Id.*

108 *Id.* at 13-14, 662 A.2d at 373.

109 *Id.* at 28, 29, 662 A.2d at 381. For a more detailed discussion of how the court's interpretation affects notification, see *supra* notes 51-52, 54-56, 58.

110 *Doe*, 142 N.J. at 30, 662 A.2d at 382.

111 *Id.* at 111, 113-14, 662 A.2d at 423, 424 (Stein, J., dissenting).

112 *Id.* at 113, 662 A.2d at 424 (Stein, J., dissenting).

113 *Id.* at 145, 662 A.2d at 440 (Stein, J., dissenting).

114 *Id.* at 44, 46, 662 A.2d at 389, 390; *see also* Artway v. Attorney General of New Jersey, 876 F. Supp. 666, 668 (D.N.J. 1995).

115 *Id.* at 44, 662 A.2d at 389; *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (defining *ex post facto* laws).

116 *See Calder*, 3 U.S. at 389. In *Calder*, Justice Chase catalogued the British abuses giving rise to the U.S. prohibition:

> The prohibition against their making *any ex post facto laws* was introduced for *greater* caution, and very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass

Supreme Court established that only those laws that inflict criminal sanctions violate the *Ex Post Facto* Clause.[117]

Whether Megan's Law violates the prohibition against *ex post facto* laws turns on a determination of the law's punitive effect.[118] Similarly, a conclusion as to whether the law is punitive is also relevant to the discussion of whether Megan's Law violates the Double Jeopardy Clause,[119] the prohibition against bills of attainder,[120] and

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> *such laws*, under the denomination of *bills of attainder*, or *bills of pains and penalties*; the *first* inflicting *capital*, and the other *less*, punishment. *These acts were legislative judgments; and an exercise of judicial power.* Sometimes they respected the *crime*, by declaring acts to be treason, which were *not* treason, when committed; at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting *one* witness, when *existing* law required *two*; by receiving evidence without *oath*; or the oath of the *wife* against the *husband*; or other testimony, which the courts of justice would not admit; at other times they inflicted *punishments*, where the party was not, by *law*, liable to *any punishment*; and in *other* cases, they inflicted *greater* punishment, than the law annexed to the offence. The ground for the exercise of such *legislative* power was this, that the *safety* of the kingdom depended on the death, or other punishment, of the offender . . . . To prevent such, and similar acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of *attainder*; or any *ex post facto law.*

Id. (footnotes and citations omitted).

117 *Id.* at 390. *Calder* defined the boundaries of the *ex post facto* clause as:

> [First, e]very law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. [Second, e]very law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. [Third, e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. [Fourth, e]very law that alters the *legal* rules of *evidence . . . in order to convict the offender.*

Id.

In later cases, however, the United States Supreme Court moved away from the notion that criminal punishment was the determinative factor in *ex post facto* analysis. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 352 (1898) (expanding the *Calder* definition to include laws that deprive a person of "a substantial right involv[ing] [their] liberty"); Kring v. Missouri, 107 U.S. 221, 235 (1882) (altering the *Calder* definition of an *ex post facto* law to one that, in relation to an offense, changes the situation of a person to his disadvantage). Recently, however, the United States Supreme Court returned to the *Calder* standard, reestablishing punishment as the determinative factor in an *ex post facto* analysis. *See* Collins v. Youngblood, 497 U.S. 37, 47-52 (1990) (stating that the departure from *Calder v. Bull* taken by the *Kring* decision was unjustified).

118 *Cf. Collins*, 497 U.S. at 47-52 (reestablishing punishment as the determinative factor in an *ex post facto* analysis).

119 *Cf.* United States v. Halper, 490 U.S. 435, 443 (1989) (determining that in a double jeopardy context, the Court's inquiry must ask "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment'").

In *Halper*, the Supreme Court analyzed whether a civil penalty could be considered punishment in the context of double jeopardy. *Id.* at 436. The Court rejected the Government's argument that because the statute in question was merely civil in

cruel and unusual punishment.[121] Generally, the registration com-

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nature, the Court was limited to an analysis of statutory construction to determine the law's punitive nature. *Id.* at 441. The Court explained:

> our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment. . . . [W]e hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.

Id. at 447 n.7.

120 *Cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 472 (1977) (explaining that the Bill of Attainder Clause forbids legislative punishment only if the government action inflicts punishment, rather than merely imposing "burdensome consequences").

The history of the bill of attainder was recounted by the Court in *United States v. Brown.* United States v. Brown, 381 U.S. 437, 441-46 (1965). The bill of attainder was a device used in England between the 16th and 18th centuries. *Id.* at 441. The bill of attainder consisted of a parliamentary act sentencing to death specific persons, usually for treason. *Id.* The attainder normally tainted the person's family—known as "corruption of blood"—so that the attaindant's heirs were prohibited from inheriting property. *Id.* Parliament also employed what was known as a "bill of pains and penalties," a device similar to the bill of attainder except that it carried penalties short of death. *Id.* Generally, the parties to be punished were named in the bills of attainder or bills of pains and penalties; sometimes, however, the parties were just described. *Id.* at 442.

In adopting the prohibition against bills of attainder, the drafters of the Constitution also included a prohibition against bills of pain and suffering. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866). By including the prohibition against bills of attainder, the Framers intended to restrict both the federal and state legislatures in order to protect the people of the United States from "the violent acts which might grow out of the feelings of the moment." *Id.* at 322.

The *Cummings* Court stated further that "[i]n these cases [of bills of pains and penalties] the legislative body, in addition to its legitimate functions, exercises the powers and office of judge . . . it pronounces upon the guilt of the party, without any of the forms or safe guards of trial." *Id.* at 323. The Court continued, noting that "[i]n all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." *Id.* at 325.

As with *ex post facto* challenges to a law, a challenger claiming that a law violates the prohibition against bills of attainder must establish that the legislation constitutes punishment. *See Nixon,* 433 U.S. at 475-478. In *Nixon,* the Supreme Court established a three-part test for determining whether legislation imposes punishment. *Id.* at 472-76, 478. First, the Court applied the "historical experience" test, examining whether the legislation imposed a "depravation or disability" that has traditionally been prohibited under the bill of attainder clause. *Id.* at 472-73. Second, the Court employed a "functional test" analyzing the law in terms of the severity and type of burdens imposed, and whether such burdens further nonpunitive legislative purposes. *Id.* at 475-76.

Finally, the Court utilized a "motivational test" that inquires whether the legislative record indicates an intent to punish. *Id.* at 478. In holding that Megan's Law did not violate the prohibition against bills of attainder, the federal district court in *Artway* applied the second prong of the *Nixon* test. Artway v. Attorney General of New Jersey, 876 F. Supp. 666, 684 (D.N.J. 1995).

121 *See* Trop v. Dulles, 356 U.S. 86, 99, 102-03 (1958) (holding that a statute revok-

ponents of sex offender registration laws, such as Megan's Law, have been found to be nonpunitive.[122]

In resolving the issue of what constitutes punishment, the United States Supreme Court normally has not distinguished between the *ex post facto*, double jeopardy, bills of attainder, and cruel and unusual punishment contexts.[123] The Supreme Court has, however, developed standards for determining whether a law is punitive in two lines of cases.[124]

In the first line—characterized by *United States v. Ward*,[125] *Kennedy v. Mendoza-Martinez*,[126] *DeVeau v. Braistead*,[127] and *Trop v. Dul-*

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ing citizenship upon military conviction for desertion is penal in nature and constitutes cruel and unusual punishment). The *Trop* Court noted that in certain contexts, including both *ex post facto* and cruel and unusual punishment cases, the court must determine whether punishment has been imposed at all. *Id.* at 94-96. In *Trop*, the Court relied in part on its analysis concerning the *ex post facto* challenge to ascertain whether punishment had been assessed. *Id.* at 95-96.

122 *See* Doe v. Poritz, 142 N.J. 1, 43-44, 662 A.2d 367, 388-89 (1995) (holding that the registration and notification provisions of Megan's Law are remedial, rather than punitive); Artway, 876 F. Supp. at 688, 692 (holding that registration provision of Megan's Law is not punitive and does not violate prohibition against *ex post facto* laws, but that the community notification provision is punitive and unconstitutional); Rowe v. Burton, 884 F. Supp. 1372, 1380, 1385 (D. Alaska 1994) (determining in a proceeding for a preliminary injunction that sex offender registration act likely to be considered nonpunitive); State v. Nobel, 829 P.2d 1217, 1224 (Ariz. 1992) (upholding registration and limited community notification as regulatory in nature); People v. Mills, 146 Cal. Rptr. 411, 414 (Cal. Ct. App. 1978) (deferring to legislative determination of punishment and upholding registration of felony sex offender against cruel and unusual punishment challenge); People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991) (upholding registration of habitual sex offender against cruel and unusual punishment challenge because registration is not punishment); State v. Costello, 643 A.2d 531, 533-34 (N.H. 1994) (finding that punitive effect of sex offender registration statute is minimal and dismissing *ex post facto* challenge); State v. Ward, 869 P.2d 1062, 1074 (Wash. 1994) (stating that registration and community notification statute is not punishment and upholding statute against *ex post facto* challenge).

But see In re Reed, 663 P.2d 216, 222 (Cal. 1983) (holding a California statute requiring sex offenders to register as cruel and unusual punishment under the California Constitution); State v. Babin, 637 So. 2d 814, 824 (La. Ct. App. 1994) (invalidating registration requirements of parole for sex offender as *ex post facto* punishment); State v. Payne, 633 So. 2d 701, 703 (La. Ct. App. 1993) (holding that retroactive application of statute requiring registration of sex offenders violated *ex post facto* clause because failure to register was punishable by fines, imprisonment, or both).

123 *See supra* notes 116-121 (analyzing the historical and legal background of each of these contexts).

124 *Compare* United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); DeVeau v. Braisted, 363 U.S. 144 (1960); and Trop v. Dulles, 356 U.S. 86 (1958) *with* Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994); Austin v. United States, 113 S. Ct. 2801 (1993); and United States v. Halper, 490 U.S. 435 (1989).

125 448 U.S. 244 (1980).

126 372 U.S. 144 (1963).

les[128] (the "*Trop* line")—the issue before the Court in each case was whether a particular statutory penalty was civil or criminal.[129] In these cases, the Court determined the character of the statute based on its purpose.[130] In determining whether a law was criminal, the primary inquiry focused on the legislative intent.[131] If the Legislature's intent was to punish, the inquiry ended and the law would be considered punitive, rather than regulatory.[132] Conversely, if the intent was regulatory, the focus turned to whether the "purpose or effect" of the law was punitive.[133]

In determining whether a law is punitive in its "purpose or effect," the United States Supreme Court has looked to a number factors which the Court enumerated in *Kennedy v. Mendoza-Martinez*.[134] The list of factors enumerated in *Mendoza-Martinez* has been

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127 363 U.S. 144 (1960).

128 356 U.S. 86 (1958).

129 *See, e.g., Ward*, 448 U.S. at 248-249; *Mendoza-Martinez*, 372 U.S. at 164; *DeVeau*, 363 U.S. at 160; *Trop*, 356 U.S. at 94, 96.

130 *See, e.g., Ward*, 448 U.S. at 248; *Mendoza-Martinez*, 372 U.S. at 169; *DeVeau*, 363 U.S. at 158; *Trop*, 356 U.S. at 96.

131 *See, e.g., Ward*, 448 U.S. at 248-49 (stating that the nature of a statutory penalty depends on congressional intent); *Mendoza-Martinez*, 372 U.S. at 169 (focusing on congressional intent in determining the punitive nature of a statute); *DeVeau*, 363 U.S. at 158 (noting that the primary question involves a determination of legislative aim); *Trop*, 356 U.S. at 96 (stating that "[t]he controlling nature of such statutes normally depends on the evident purpose of the legislature"); *see also* United States v. Salerno, 481 U.S. 739, 747 (1987) (declaring in the context of due process that "[t]o determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent").

132 *See, e.g., Mendoza-Martinez*, 372 U.S. at 167, 169 (holding that several factors, including congressional intent, require that statute in question be interpreted as punitive); *DeVeau*, 363 U.S. at 160 (finding that the New York Legislature intended statute to regulate waterfront crime, not to punish previously convicted felons); *Trop*, 356 U.S. at 97 (determining that the purpose of challenged statute is punishment; thus, the law is penal); *see also* State v. Noble, 829 P.2d 1217, 1221 (Ariz. 1992) (noting that "[i]f the legislative aim was punitive, we treat the registration requirement as a punishment").

133 *See, e.g., Ward*, 448 U.S. at 248-49 (stating that in the face of ambiguous congressional intent, Congress's classification of a statutory penalty as civil must stand).

134 *Mendoza-Martinez*, 372 U.S. at 168. The Court described the factors to be considered as follows:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. (footnotes omitted).

applied as a "test" by several courts in recent cases to determine whether a statute is punitive.[135]

In a second and more recent line of cases—represented by *Montana Department of Revenue v. Kurth Ranch*,[136] *Austin v. United States*,[137] and *United States v. Halper*[138] (the "*Halper* line")—the Court focused not on whether the civil penalty in question was civil or criminal, but on whether the penalty constituted punishment.[139] In *Halper*, the Court established that the actual purpose of the sanction, rather than the nature of the proceeding,[140] is dispositive in determining whether the sanction constitutes punishment.[141] In the *Halper* line, the Court seems to focus exclusively on whether the sanction serves the dual aims of statutory sanctions, namely retribution and deterrence.[142]

In *Doe v. Poritz*, the New Jersey Supreme Court approached the issue of whether Megan's Law is punitive by first setting forth the traditional analysis of the *Trop* line and then reconciling with the

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135 *See, e.g.*, Artway v. Attorney General of New Jersey, 876 F. Supp. 666, 673 (D.N.J. 1995) (applying the *Mendoza-Martinez* factors to Megan's Law); Rowe v. Burton, 884 F. Supp. 1372, 1378-81 (D.Alaska 1994) (applying the *Mendoza-Martinez* factors to Alaska's sex offender registration statute); *Noble*, 829 P.2d at 1221-24 (applying the *Mendoza-Martinez* factors to Arizona's sex offender registration statute).

136 114 S. Ct. 1937 (1994).

137 113 S. Ct. 2801 (1993).

138 490 U.S. 435 (1989).

139 *See, e.g., Kurth Ranch*, 114 S. Ct. at 1946-48 (analyzing whether state's Dangerous Drug Tax statute constituted punishment); *Austin*, 113 S. Ct. at 2806 (stating that the central inquiry in analyzing a forfeiture statute is not whether the statute is criminal or civil, but whether it is punishment); *Halper*, 490 U.S. at 436, 443 (considering whether a civil penalty constitutes punishment).

140 *Halper*, 490 U.S. at 447 n.7.

141 *Id.* at 448. The Court states:

> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Id. (citations omitted).

142 *See, e.g., Kurth Ranch*, 114 S. Ct. at 1948 (asserting that state drug tax is not remedial, but purely retributive and, thus, constitutes punishment); *Austin*, 113 S. Ct. at 2806 (noting the distinction between remedial and retributive laws); *Halper*, 490 U.S. at 448 (concluding that a civil sanction that is retributive, rather than remedial, is punishment).

Halper line.[143] The *Doe* court articulated a four-part test for determining whether a law is punitive.[144] The first step, the court instructed, is to ascertain whether the legislative intent is punitive or regulatory.[145] Second, the court determined that if the intent is clearly punitive, then the inquiry must end.[146] Third, the majority proclaimed that if the intent is regulatory, then the court must assess whether the impact of the law is punitive, that is, whether the law advances retribution and deterrence.[147] Finally, the court declared that a punitive impact—either retribution or deterrence—results in the law being classified as punishment only if punitive intent is the sole explanation for such impact.[148] The court further clarified the distinction between laws that will be considered regulatory and those that will be considered punitive.[149]

The *Doe* court continued its analysis by rejecting the interpretation of the *Halper* line offered by the challengers to Megan's Law.[150] The court, relying on the factual context of *Halper*, narrowly interpreted the *Halper* line.[151] The majority in *Doe* identified specific language in *Halper*—stating that civil sanctions that do not serve a solely remedial purpose, but also a deterrent or retributive purpose, are punitive—as the cause of the confusion surrounding the question of what constitutes punishment.[152] The *Doe* court explained that this language was not intended to apply to remedial sanctions exhibiting some retributive or deterrent effects, but only to sanctions that may be characterized only as retribution or deter-

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143 Doe v. Poritz, 142 N.J. 1, 46-73, 662 A.2d 367, 390-404 (1995).

144 *Id.* at 46, 662 A.2d at 390.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.* The court explained that a law may be characterized as regulatory even if it has some punitive impact, provided that the impact is "simply an inevitable consequence of the regulatory provisions themselves." *Id.* The court cautioned, however, that if the punitive impact of a law is due to unnecessary or excessive aspects in relation to the law's regulatory purpose, then that law will be considered punitive. *Id.*

150 *Id.* at 50, 662 A.2d at 392. The challengers and *amici* had argued that the *Halper* line meant that "any punitive impact, no matter how minimal, no matter how clearly the product of a provision otherwise solely remedial, standing alone, *compels* the conclusion that punishment has been inflicted for *ex post facto* purposes." *Id.* The court acknowledged that such an interpretation could arguably be supported by the language of the *Halper* line, but the court concluded that on closer inspection those cases "say[ ] nothing of the kind." *Id.*

151 *Id.* at 52, 662 A.2d at 393. The *Doe* court noted that *Halper* involved the issue of whether a statutory penalty under the False Claim Act would be considered remedial or punitive. *Id.*

152 *Id.* at 50-52, 622 A.2d at 392-93.

rence.[153] Further, the court declared that both *Austin* and *Kurth* supported this interpretation of *Halper*.[154] The court thus concluded that the *Halper* line does not stand for the proposition that any punitive impact, no matter how minimal, will render a civil sanction punitive.[155]

The *Doe* majority then addressed and rejected the use of the *Mendoza-Martinez* test[156] as the determinative test in punishment analysis.[157] The court found that *Mendoza-Martinez* only provided a list of factors to be considered, not a dispositive test.[158] Finally, the *Doe* court held that Megan's Law did not impose punishment.[159] The majority found that the legislative history and the statutory purposes articulated in the statute clearly established a remedial purpose for Megan's Law.[160] Further, the court characterized the provisions as carefully tailored to perform their remedial function

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153 *Id.* at 52, 662 A.2d at 393.

154 *Id.* at 54, 60, 662 A.2d at 394, 397 (citing Austin v. United States, 113 S. Ct. 2801, 2806 (1993) and Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1945 n.14, 1947 (1994)).

155 *Id.* at 60, 662 A.2d at 397.

156 *See supra* notes 134-35 (describing the *Mendoza-Martinez* factors).

157 *Doe*, 142 N.J. at 63, 662 A.2d at 398. The court explained the rejection of the "so-called 'test' of *Mendoza-Martinez*" by enunciating that:

> What seemed clear from the [*Mendoza-Martinez*] Court's language was that it was not suggesting any "test" to determine whether a proceeding is civil or criminal. The Court described the factors as "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character." . . . Rather than delineating *the* list of factors that must be considered *together* in order to reach that determination, the Court simply listed various factors, the tests, each of which had been used by itself in reaching a determination of whether a statute was penal (criminal) or regulatory (civil), and each of which therefore might be relevant in the future in making that determination, whether alone or in conjunction with the others.

Id. at 64, 662 A.2d at 399 (citation omitted).

In making this determination, the court discussed several United States Supreme Court cases subsequent to *Mendoza-Martinez* that did not apply the *Mendoza-Martinez* factors as a determinative test. *Id.* at 65-73, 662 A.2d at 399-404 (citing Austin v. United States, 113 S. Ct. 2801, 2806 n.6 (1993); United States v. Halper, 490 U.S. 435, 447 n.7 (1989); Schall v. Martin, 467 U.S. 253, 269 (1984); United States v. Ward, 448 U.S. 242, 250-51 (1980); Bell v. Wolfish, 441 U.S. 520, 538-39 (1979)).

The *Doe* court's approach directly conflicts with the method utilized by the United States District Court for the District of New Jersey in *Artway v. Attorney General of New Jersey*, which relied on the *Mendoza-Martinez* factors in holding that notification constituted punishment. *Cf.* Artway v. Attorney General of New Jersey, 876 F. Supp. 666, 673 n.8 (D.N.J. 1995). In *Artway*, Judge Politan adopted *Mendoza-Martinez* as the appropriate analysis in *ex post facto* review contexts, although both parties contended in their briefs that the *Mendoza-Martinez* analysis was not the appropriate test. *Id.*

158 *Doe*, 142 N.J. at 64, 662 A.2d at 399.

159 *Id.* at 73, 662 A.2d at 404.

160 *Id.*

while avoiding excessive intrusion into the offender's anonymity.[161] The deterrent and retributive impacts, the court stated, are simply inevitable and unavoidable consequences of the Megan's Law provisions, whose remedial purpose is to protect the community.[162]

B. *The Right to Privacy and the Registration and Notification Provisions of Megan's Law*

Embedded in the liberty interest protected by the Fourteenth Amendment is the right to privacy.[163] The right to privacy protects an individual's interest in keeping personal matters confidential[164] and in autonomously making important personal decisions.[165] The threshold inquiry in a privacy analysis typically involves a determination of whether the individual has a reasonable expectation of privacy.[166] The right to privacy, however, is not absolute, and governmental intrusion into an individual's privacy interest, such as the gathering and disclosing of certain information, may be justi-

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161 *Id.* at 74, 662 A.2d at 404.

162 *Id.* at 73-74, 662 A.2d at 404.

163 *See* United States Dep't of Justice v. Reporters Comm., 489 U.S. 749, 770 (1989) (acknowledging the constitutionally protected privacy interest in keeping personal facts from public view); Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (stating that "the court has recognized that one aspect of the 'liberty' interest protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy'") (*quoting* Roe v. Wade, 410 U.S. 113, 152 (1973)); *see also* Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (recognizing privacy interest in certain personal information); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (declaring that "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy").

164 *See Whalen*, 429 U.S. at 599 (recognizing that the right of privacy includes "the individual interest in avoiding disclosure of personal matters"); *see also Reporters Comm.*, 489 U.S. at 769 (remarking that "[w]e have also recognized the privacy interest in keeping personal facts away from the public eye"); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457 (1977) (holding that public officials have a recognized interest in avoiding disclosure of "matters of personal life unrelated to any acts done by them in their public capacity").

165 *See Roe v. Wade*, 410 U.S. at 153 (holding that the Fourteenth Amendment right to privacy includes a woman's decision whether to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (declaring that "[i]f the right to privacy means anything, it is the right of the *individual*. . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that individuals' decisions relating to marriage protected from unwarranted government intrusion); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (invalidating as unconstitutional a statute prohibiting the use of contraceptives); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (stating that liberty interest applies to child rearing); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that liberty interest includes freedom to pursue education).

166 Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990).

fied.[167] The determination of whether the governmental intrusion is warranted entails balancing the government's interest in disclosure against the individual's interest in maintaining confidentiality.[168] Additionally, some courts have required that the governmental intrusion be narrowly tailored to advance the state's interest.[169]

Sex offenders challenging Megan's Law claim that the information gathered at registration and disseminated to the public, at least at Tiers Two or Three, violates the offenders' right to privacy.[170] The information required for registration includes the offender's name, Social Security number, race, age, gender, height, weight, date of birth, eye and hair color, residential address (legal and temporary), place and date of employment,[171] and the offender's criminal history.[172] The information that may be released upon Tier Two or Three classification includes the offender's name, photograph, address, place of employment or school at-

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167 *See, Carey* 431 U.S. at 686 (recognizing that the privacy right is not absolute and that compelling state interests may warrant governmental regulation); *see also* Nilson v. Layton City, 45 F.3d 369, 371 (10th Cir. 1995) (stating that personal information may be disclosed in the face of a "compelling state interest"); Fraternal Order of the Police v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987) (explaining that no absolute protection against disclosure exists at law).

168 *See Nixon*, 433 U.S. at 458. In *Nixon*, the Court applied a balancing test to a claimed violation of a confidentiality interest, stating that "the merit of appellant's claim . . . must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest." *Id.* The Court generally applies a compelling state interest standard to cases dealing with governmental intrusion into individual privacy. *See, e.g., Carey*, 431 U.S. at 686 ("[R]egulations imposing a burden on [a privacy interest] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."); *Whalen*, 429 U.S. at 606 (Brennan, J., concurring) ("Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."); *Roe v. Wade*, 410 U.S. at 153-54 ("At some point in pregnancy, these [government] interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.").

The federal circuit courts seem to have adopted a standard lower than the "compelling" state interest standard articulated by the Supreme Court. *See, e.g., Fraternal Order of Police*, 812 F.2d at 110 ("Most circuits appear to apply an 'intermediate standard of review' for the majority of confidentiality violations . . . with a compelling interest analysis reserved for 'severe intrusions' on confidentiality.").

169 *See Carey*, 431 U.S. at 686 ("[R]egulations imposing a burden on a [privacy interest] . . . must be narrowly drawn to express only those interests."); *cf.* Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981) (in determining whether governmental intrusion may be made, courts must consider whether "disclosure can be made in the least intrusive manner").

170 Doe v. Poritz, 142 N.J. 1, 78, 662 A.2d 367, 406 (1995).

171 N.J. STAT. ANN. § 2C:7-4(b)(1) (West 1995).

172 *Id.* § 2C:7-4(b)(2).

tended, and a description of the offender's vehicle, including the license plate number.[173]

Relying on this existing case law, the New Jersey Supreme Court in *Doe v. Poritz* commenced its privacy inquiry with the threshold question of whether the registration provision impinges on any expectation of privacy held by sex offenders.[174] After analyzing each item of information required for registration, the *Doe* majority held that sex offenders do not have a privacy interest in the information.[175]

First, the court found that an individual does not have an expectation of privacy in information that is available on the public record, such as prior criminal history, age, address, and vehicle description.[176] Additionally, the court concluded that the descriptive

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173 *Attorney General Guidelines*, *supra* note 52, at 13.

174 *Doe*, 142 N.J. at 78, 662 A.2d at 406.

175 *Id.* at 79-81, 662 A.2d at 407-08. While the *Doe* court considered registration separately from notification, the federal court in *Artway v. Attorney General of New Jersey* analyzed the effect disclosure would have on registration information. *See* Artway v. Attorney General of New Jersey, 867 F. Supp. 666, 683 (D.N.J. 1995) (noting that personal matters subject to registration are entwined with the notification provisions of Megan's Law); *cf.* Whalen v. Roe, 429 U.S. 589, 605 (1977) (upholding a New York statute requiring registration of certain prescription drugs sold at pharmacies).

In the *Whalen* decision, the Court emphasized the fact that the registered information would not be disclosed. *Whalen*, 429 U.S. at 605. In a concurrence, Justice Brennan warned that "[b]road dissemination by state officials . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." *Id.* at 606 (Brennan, J., concurring).

176 *Doe*, 142 N.J. 79, 80, 662 A.2d at 407. In making this determination, the court relied on several federal court decisions holding that an individual has no constitutionally-protected expectation of privacy in "matters of public record." *Id.* (citing Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995); Doe v. City of New York, 15 F.3d 264, 268 (2d Cir. 1994); Walls v. City of Petersburg, 895 F.2d 188, 193-94 (4th Cir. 1990); Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 117 (3d Cir. 1987)).

As to the criminal records, the court based its decision on the fact that New Jersey guarantees public access to all court records. *Id.* at 79, 662 A.2d at 407 (citing N.J. Ct. R. 1:38). Additionally, the court noted that in New Jersey, any person may obtain a complete criminal history on another by contacting the State Police and providing them with a name, a date of birth or Social Security number, and a $15 fee. *Id.* (citing N.J. Stat. Ann. 53:1-20.6 (West Supp. 1995)). The court also revealed that New Jersey law provides that prior to considering any adult inmate for release, the Parole Board must notify the local prosecutor's office of each county, police departments, and the press by releasing the inmate's name, crimes, and place of conviction. *Id.* at 79-80, 662 A.2d at 407 (citing N.J. Stat. Ann. 30:4-123.48(g), 123.45(b)(5) (West 1995)). Finally, the court indicated that New Jersey law requires that crime victims be notified of a defendant's release from custody. *Id.* at 80, 662 A.2d at 407 (citing N.J. Stat. Ann. 52:4B-44b(21) (West Supp. 1995)).

As far as descriptive information, such as the sex offender's age, legal address, and vehicle description, the court found that these items are also part of the public record available through the Division of Motor Vehicles. *Id.*

information required at registration, such as a photograph, fingerprints, or description of physical appearance, is not protected because individuals cannot possess an expectation of privacy interest in matters exposed to public view.[177]

The court next turned to the question of whether Tiers Two or Three sex offenders have a reasonable and protectable expectation of privacy in the information released to the public pursuant to the notification provisions.[178] Following an analysis similar to that applied to the registration provision, the court appraised each item of information to be disclosed and concluded that when considered individually, no constitutionally-protected right to privacy applied to any one item, with the possible exception being the offender's home address.[179] The court determined that the release of information contained in the offender's criminal records does not infringe on an offender's right to privacy.[180] The majority also concluded that dissemination of the offender's photograph and physical description does not rise to a violation of the offender's privacy rights because matters exposed to public view are not protected.[181] Nevertheless, the court focused on the dissemination of the offender's home address and the impact of the information subject to release as a whole, and concluded that the notification provision may infringe upon an offender's right to privacy.[182]

After concluding that the notification provision implicates a privacy interest, the court turned to the question of whether the

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177 *Id.* at 80-81, 662 A.2d at 407. The court relied on several United States Supreme Court cases addressing the Fourth Amendment in reaching this determination. *Id.* (citing United States v. Dionisio, 410 U.S. 1, 14 (1973); Cupp v. Murphy, 412 U.S. 291, 295 (1973); Katz v. United States, 389 U.S. 347, 351 (1967)).

178 *Id.* at 81, 662 A.2d at 408.

179 *Id.* at 82, 662 A.2d at 408.

180 *Id.* at 81, 662 A.2d at 408 (relying on Paul v. Davis, 424 U.S. 693, 713 (1976) (holding that government disclosure of arrest record does not impinge defendant's right to privacy); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (determining that disclosure of information from judicial proceedings does not violate right to privacy); Scheetz v. The Morning Call, Inc., 946 F.2d 202, 207 (3d Cir. 1991) (declaring that release of information in police report does not violate right to privacy), *cert. denied*, 502 U.S. 1095 (1992)).

181 *Doe*, 142 N.J. at 82, 662 A.2d at 408.

182 *Id.* at 82-83, 662 A.2d at 408-09. The court specifically stated:

> In this case, where as a result of the information disclosed under the Notification Law, plaintiff may be exposed to uninvited harassment, we conclude that disclosure of plaintiff's home address, particularly when coupled with the other information disclosed, implicates a privacy interest.

Id. at 84, 662 A.2d at 409.

state's interest justifies disclosure.[183] Applying a balancing test developed by the Third Circuit Court of Appeals,[184] the court held that the notification provision could be justified because the state has a substantial interest in protecting society from the dangers of recidivism by sex offenders.[185] The court recognized that the clinical knowledge regarding sex offender recidivism is highly disputed, but stated that the Legislature can justifiably address an important societal problem based on the information available at the time.[186] Although finding that the offender has a privacy interest in the totality of the information released through community notification, the court surmised that the offender's expectation of privacy is diminished because most of the information released is available on the public record and, therefore, individual items of information are not protected.[187] Additionally, the court noted that the scope of disclosure via notification is "carefully calibrated" to meet the state interest.[188] Finally, the court concluded that the state's interest in protecting the public outweighed the sex offender's privacy interest.[189]

C. *Deprivation of Procedural Due Process*

As enacted, Megan's Law provides for tier classification of a sex offender and community notification based on the county prosecutor's determination, without providing the sex offender with notice or an opportunity to be heard prior to classification and possible community notification.[190] Whether Megan's Law violates the requirements of procedural due process turns on whether the tier classification and the potential community notification im-

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183 *Id.* at 87, 662 A.2d at 411.

184 *Id.* at 87-88, 662 A.2d at 411 (citing United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980)). The court reported that the following factors must be considered:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. (quoting Faison v. Parker, 823 F. Supp. 1198, 1201 (E.D. Pa. 1993)).

185 *Doe*, 142 N.J. at 88-89, 662 A.2d at 412.

186 *Id.*, 662 A.2d at 411-12.

187 *Id.* at 88, 662 A.2d at 411.

188 *Id.* at 89, 662 A.2d at 412.

189 *Id.* at 90-91, 662 A.2d at 412-13. The court determined that the New Jersey Constitution requires a similar result. *Id.*

190 *See* N.J. STAT. ANN. § 2C:7-8(d).

pinges upon a constitutionally-protected right of the offender.[191]

Sex offenders claim that notice and a hearing are required because the law implicates their privacy interest.[192] The New Jersey Supreme Court agreed, and held in *Doe* that the lack of procedural due process requires judicial review of the tier classification and of the proposed manner of Tier Two and Three notification.[193] Judicial review, the court declared, is to be accomplished through summary proceedings conducted prior to notification upon request by the sex offender.[194]

The court mandated that the *Attorney General Guidelines* be modified to provide for written notice to offenders regarding proposed tier classifications and the manner of notification.[195] The court further stated that the notice must provide the offender with adequate time to object.[196] Moreover, the court required that the notice specifically inform the offender about the right to a judicial hearing; that notification will proceed unless the offender exercises such right within the specified date; and that notification will not be made if the offender exercises the right to a hearing by making timely application unless the court, after a hearing, approves the notification.[197] The majority also dictated that the written notification must advise the offender of the right to counsel,[198] of the procedure for applying for judicial review, and of the impor-

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191 *See Doe*, 142 N.J. at 99, 662 A.2d at 417 (describing the test to be applied in a procedural due process context).

192 *Id.* at 100, 662 A.2d at 417.

193 *Id.* Although upholding the constitutionality of Megan's Law, the court determined that the statute's provisions sufficiently impinge upon sex offenders' liberties to "trigger both procedural due process and the fairness doctrine in [New Jersey]." *Id.* at 30, 662 A.2d at 382.

194 *Id.*

195 *Id.*

196 *Id.* The court stated that notice must provide the offender with a minimum two-week period in which to respond and apply for a hearing. *Id.* The court allowed the prosecutor to retain some flexibility, stating that: "We realize that in some cases it may be impossible as a practical matter to give such notice, or to give it timely, and in those cases it maybe dispensed with." *Id.*

197 *Id.* at 30-32, 662 A.2d at 382-83.

198 *Id.* at 31, 662 A.2d at 382. As in a criminal trial, the presiding court will provide counsel if the offender cannot afford an attorney. *Id.* The requirement that the offender be provided with counsel has become the new issue of contention for the implementation of Megan's Law. *See* Dana Coleman, *Pro Bono Constitutional Attack Brews*, N.J. LAW., Oct. 30, 1995, at 1, 16 (describing the controversy arising from the requirement that sex offenders be represented *pro bono* at notification hearings). The court apparently anticipated these problems, however, and "strongly suggest[ed] that legislation providing for representation be adopted." *Doe*, 142 N.J. at 31, 662 A.2d at 382.

tance of filing such an application in a timely manner.[199]

In addition to requiring written notice to the sex offender, the New Jersey Supreme Court also promulgated procedures to be followed by courts conducting Megan's Law hearings.[200] The *Doe* court established that after receiving the offender's objection to either tier classification or manner of notification, the presiding court first must set the date for the summary hearing and decision[201] and appoint counsel for the sex offender if necessary.[202] Additionally, the *Doe* court mandated that the prosecutor turn over all materials and documents, including the prosecutor's findings and statements of reason for the tier classification and proposed manner of notification.[203] The court granted the presiding trial court full control over the summary hearing, which must be conducted *in camera*.[204] The *Doe* court further stipulated that the trial court is not required to apply the rules of evidence and has discretion as to the production of witnesses, cross-examination, and the use of experts.[205]

The majority also dictated the consequences of the summary hearing.[206] If the trial court affirms the prosecutor's decision, then public notification may proceed.[207] If, however, the court reverses the prosecutor's decision, notification may only proceed after compliance with the court's decision.[208] The *Doe* court also provided that in the event that the trial court affirms the prosecutorial decision, the offender is not automatically entitled to a stay of notification, although a stay may be granted if justified by the circumstances.[209]

To ensure the uniform application of Megan's Law, the New Jersey Supreme Court required that a three-judge panel be established to review all such judicial hearings.[210] Additionally, the *Doe* majority required that a bench manual be designed[211] and that the Administrative Office of the Courts publish an annual report to

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199 *Id.* The court envisioned a "simple letter" as the required form of application by the offender. *Id.*

200 *Id.* at 31-32, 662 A.2d at 382-83.

201 *Id.* at 31, 662 A.2d at 382.

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.* at 31-32, 662 A.2d at 383.

207 *Id.* at 32, 662 A.2d at 383.

208 *Id.* at 31-32, 662 A.2d at 383.

209 *Id.* at 32, 662 A.2d at 383.

210 *Id.* at 39, 662 A.2d at 386.

211 *Id.*

keep the public informed about the number and disposition of Megan's Law hearings.[212]

C. *Equal Protection*

The third major claim asserted by sex offenders is that Megan's Law violates their right to equal protection.[213] The guiding principle of equal protection is that similarly situated people should be treated similarly.[214] The United States Supreme Court has long held that classifications by a state are not per se unconstitutional; rather, they become so only if they are arbitrary and without a rational legal basis.[215] When a classification does not impact a suspect class or involve fundamental rights, the courts generally will uphold the classification if the law is rationally related to a legitimate government interest.[216] The United States Supreme Court has respected the separation of powers by liberally construing the rational basis test respecting the separation of powers and upholding classifications if the government action is supported by plausible reasons.[217]

The *Doe* court followed this rational basis analysis in holding that Megan's Law does not offend equal protection.[218] The *Doe* majority rejected the claim that equal protection requires the law to view offenders as individuals rather than as a class.[219] The court commenced its equal protection analysis by noting that equal protection does not proscribe classifications, but simply requires that the classification not be arbitrary.[220] Next, the court stated that classifications that neither target a suspect class nor encroach upon a fundamental right need only have a rational relation to the pur-

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212 *Id.* The court suggested that the notice and hearing scheme designed in *Doe* may be altered by the Legislature so long as procedural due process requirements are satisfied. *Id.* at 39-40, 662 A.2d at 387.

213 *Id.* at 91, 662 A.2d at 413. The Equal Protection Clause of the United States Constitution states, in relevant part, that "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

214 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

215 *Id.* at 440; *see also* United States v. Burnison, 339 U.S. 87, 95 (1950) (explaining that only arbitrary and unjustified discriminatory treatment violates equal protection); Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (noting that equal protection only prohibits treatment that is arbitrary and without legal basis).

216 *See Cleburne*, 473 U.S. at 440 (describing the rational basis test). The party challenging the legislation has the burden of proving that the legislation is arbitrary and with no rational basis. *Id.* at 339-40.

217 *Id.* at 441-42; *see also* F.C.C. v. Beach Comms., Inc., 113 S. Ct. 2096, 2101 (1993) (applying rational basis review to overturn FCC cable television regulation).

218 Doe v. Poritz, 142 N.J. 1, 91-95, 662 A.2d 367, 413-15 (1995).

219 *Id.* at 91, 662 A.2d at 413.

220 *Id.*

pose sought by the state.[221] After finding that the classification of sex offenders into tiers neither impacts a suspect class nor impinges a fundamental constitutional right,[222] the majority held that Megan's Law does not violate the Equal Protection Clause because classification as a sex offender is legitimately based on the offender's conviction or adjudication for enumerated sex offenses.[223]

IV. CONCLUSION

The national problem of sex offender recidivism and the inadequacy of the existing laws has demanded legislative response. In enacting Megan's Law, the New Jersey Legislature relied on data indicating that sex offenders as a group have a high rate of recidivism and that treatment is not efficacious.[224] Highly publicized and heinous crimes committed by habitual sex offenders, in many cases neighbors of the victims, corroborate this statistical data.[225] The New Jersey Legislature—perhaps realizing that the permanent and devastating harm inflicted by sex offenders impacts not only the individual victims and their families but society as well—overwhelmingly adopted Megan's Law.[226]

The registration and notification provisions of Megan's Law provide a rational response to the dangers of sex offender recidivism. Megan's Law, particularly through notification, enhances public safety by informing parents that a potentially dangerous person lives in their neighborhood, consequently allowing parents to take common sense preventive measures to protect themselves and their children. Megan's Law tips the balance in favor of the innocent victims of sex crimes rather than the perpetrators. The court and the Legislature expressed heightened sensitivity to the balancing of interests that inevitably must occur when societal preserva-

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221 *Id.* at 92, 662 A.2d at 413.

222 *Id.* at 92-93, 662 A.2d at 414.

223 *Id.* at 95, 662 A.2d at 415. The court found that "the registration and notification requirements are rationally related to [the] legitimate state interest" of protecting the public from convicted sex offenders and must therefore be upheld. *Id.* at 93, 662 A.2d at 414.

224 *See* N.J. STAT. ANN. § 2C:7-1 (providing legislative findings and statement of purpose for Megan's Law); *see also supra* notes 66, 88-93 and accompanying text (discussing the recidivism and treatment data relied on by legislatures in enacting sex offender statutes).

225 *See supra* notes 1-6, 17, 24 and accompanying text (describing the nationwide public response to sex crimes by habitual offenders).

226 Mendez, *Measures Go to Governor*, *supra* note 1, at 1, 18. Only one negative vote was cast on any of the seven measures passed by the New Jersey Assembly. *Id.* at 18. The notification provisions passed unanimously; several legislators abstained in order to avoid casting negative votes. *Id.* at 1, 18.

tion conflicts with the rights of the individual. Megan's Law is a pragmatic response to an intractable and painful problem. It may not be a panacea, but it is the best of the available alternatives. Had Megan's parents known that Jesse Timmendequas was a convicted sex offender, they could have informed their children about the dangers posed by such a person, perhaps avoiding the tragedy of Megan's murder.

Opponents of Megan's Law claim that registration and notification constitute punishment because the law deprives a small group of offenders of their anonymity and could potentially subject them to ostracism, harassment, or vigilantism.[227] Besides the speculative nature of such a claim, these opponents disregard Megan's Law's purpose as a purely regulatory measure to protect society.[228] Any unpleasant consequences that sex offenders may suffer will not flow directly from Megan's Law, but, rather, from public reaction to the offenders' criminal history. Rather than promoting vigilantism or witch hunts, Megan's Law was designed to arm citizens with public knowledge of potentially dangerous criminals that had previously been difficult to obtain. The Attorney General has made it clear that in implementing the law, anyone involved in vigilantism or harassment will be prosecuted.[229]

Without abandoning its constitutional moorings, the New Jersey Supreme Court in *Doe v. Poritz* ventured into uncharted waters to uphold Megan's Law, a necessary and timely piece of legislation that allows society to protect itself from repetitive sex offenders. By carefully refining the notification provisions and providing for judicial review of tier classification, the court struck a balance between offenders' rights and societal interests. The court appropriately interpreted the constitutional provisions protecting individual liberty, dignity, and freedom so as not to convert them into obstacles for preventing the enactment of laws that are free of punitive intent and designed solely to protect society. Despite the potentially severe impact that registration and notification may have on the lives of sex offenders, the law as interpreted and upheld by the New Jersey Supreme Court remains within constitutional bounds.

Elga A. Goodman

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227 *See Doe*, 142 N.J. at 77, 662 A.2d at 406 (dismissing arguments that Megan's Law is inextricably linked to public stigma and ostracism).

228 *See id.* at 73, 75, 662 A.2d at 404, 405 (holding that the sole purpose and effect of Megan's Law is regulatory, with the intent to protect society from the threat of habitual sex offenders).

229 *Attorney General Guidelines*, *supra* note 52, at 13.

SEX OFFENDER

Initial Registration ☐ Re-Registration ☐

Type or print - use black ink

Se
B
I

LEAVE THIS SPACE BLANK

LAST NAME	FIRST NAME	MIDDLE NAME

DATE OF BIRTH	PLACE OF BIRTH (City, State)	SEX	RACE	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY NUMBER

In accordance with the provisions of N.J.S.A. 2C:7-1 through 7-5, I acknowledge that I have been advised of my duty to register and re-register as a sex offender. I know that I must advise the local/state police whenever I change my original registration address. I am aware that failure to register or re-register is a crime pursuant to N.J.S.A. 2C:7-2a.

✓
SIGNATURE OF REGISTRANT

REGISTRATION DATE

ADDRESS OF LEGAL RESIDENCE (Street, City/Zip)

SBI NUMBER

CURRENT OR TEMPORARY RESIDENCE (Street, City, Zip)

CONTRIBUTOR / ORI NUMBER

SCARS / TATTOOS / ALIASES / MAIDEN NAME(S) / OTHER DOB

1. RIGHT THUMB	2. RIGHT INDEX	3. RIGHT MIDDLE	4. RIGHT RING	5. RIGHT LITTLE

6. LEFT THUMB	7. LEFT INDEX	8. LEFT MIDDLE	9. LEFT RING	10. LEFT LITTLE

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY	LEFT THUMB	RIGHT THUMB	RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

SBI 158 (12-94)

OCCUPATION	DATE AND ADDRESS OF EMPLOYMENT (List Name and Address of School if a Student)

SEX OFFENSE INFORMATION — *Use the Miscellaneous Block for Additional Offense(s)*

OFFENSE(S)	DISPOSITION: CONVICTED ☐ NOT GUILTY BY REASON OF INSANITY ☐ ADJUDICATED DELINQUENT ☐

DATE OF DISPOSITION	NAME OF COURT AND STATE	INDICTMENT/ACCUSATION NUMBER	SENTENCE

BRIEF DESCRIPTION OF THE OFFENSE(S)

OFFENSE(S)	DISPOSITION: CONVICTED ☐ NOT GUILTY BY REASON OF INSANITY ☐ ADJUDICATED DELINQUENT ☐

DATE OF DISPOSITION	NAME OF COURT AND STATE	INDICTMENT / ACCUSATION NUMBER	SENTENCE

BRIEF DESCRIPTION OF THE OFFENSE(S)

MISCELLANEOUS / ADDITIONAL OFFENSE(S)

ATTACH PHOTOGRAPH OF REGISTRANT

INSTRUCTIONS:
N.J.S.A. 2C:7-1 through 2C:7-5 requires certain criminal justice agencies to forward this Sex Offender Registration Fingerprint Card and a Federal Criminal Fingerprint Card To:

State Bureau of Identification
P.O. Box 7068
West Trenton, NJ 08628-0068

SEX OFFENDER RISK ASSESSMENT SCALE

Criteria	Low Risk	0	Moderate Risk	1	High Risk	3	Comments	Total
Seriousness of Offense x5								
1. Degree of Force	no physical force; no threats		threats; minor physical force		violent; use of weapon; significant victim harm			
2. Degree of Contact	no contact; fondling over clothing		fondling under clothing		penetration			
3. Age of Victim	18 or over		13-17		under 13			
							Subtotal:	
Offense History x3								
4. Victim Selection	household/ family member		acquaintance		stranger			
5. Number of Offenses/ Victims	first known offense/victim		two known offenses/victims		three or more offenses/victims			
6. Duration of Offensive Behavior	less than 1 year		1 to 2 years		over 2 years			
7. Length of Time Since Last Offense	5 or more years		more than 1 but less than 5 years		1 year or less			
8. History of Anti-Social Acts	no history		limited history		extensive history			
							Subtotal:	
Characteristics of Offender x2								
9. Response to Treatment	good progress		limited progress		prior unsuccessful treatment or no progress in current treatment			
10. Substance Abuse	no history of abuse		in remission		not in remission			
							Subtotal:	

Community Support x1								
11. Therapeutic Support	current/ continued involvement in therapy		intermittent		no involvement			
12. Residential Support	supportive/ supervised setting; appropriate location		stable and appropriate location but no external support system		problematic location and/or unstable; isolated			
13. Employment/Educational Stability	stable and appropriate		intermittent but appropriate		inappropriate or none			
							Subtotal:	
							Total:	

Scoring: Highest possible total score = 111
Low Range: 0-36 Moderate Range: 37-73 High Range 74-11